IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SAMUEL EDWARD CLARK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11460 Trial Court No. 3PA-10-2936 CR MEMORANDUM OPINION No. 6265 — January 6, 2016

Appeal from the Superior Court, Third Judicial District, Palmer, Eric Smith, Judge.

Appearances: Sharon B. Barr, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Elizabeth T. Burke, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

A jury returned verdicts finding Samuel Edward Clark guilty of first- and second-degree murder but not guilty of the lesser-included offense of manslaughter.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

When the trial judge asked the jury to explain what it meant by these facially inconsistent verdicts, the jury explained that it interpreted the jury instructions as requiring it to acquit Clark of manslaughter once it found him guilty of murder. Hearing this explanation, the trial judge concluded that the two verdicts were not inconsistent, and he entered a first-degree murder conviction against Clark.

On appeal, Clark argues that the trial judge erred when he asked the jurors to explain their verdicts. For the reasons explained in this opinion, we conclude that the trial judge's inquiry was proper, and we affirm Clark's murder conviction.

Facts and proceedings

Talkeetna resident Dirk Fast joined his friend Samuel Clark at a table in a Talkeetna bar. After conversing for a time without apparent conflict, both men stood up. Clark then pulled out a gun and shot Fast in the chest. Fast died immediately. Bar patrons testified that Clark exclaimed, "He killed my family." One patron thought Clark appeared to be deranged.

At trial, Clark's attorney argued that Clark did not intend to kill Fast but only wanted to "stop [a] threat." Accordingly, he asked the jury to convict Clark of manslaughter rather than murder.

Paraphrasing the manslaughter statute,[1] Superior Court Judge Eric Smith instructed the jury that to find Clark guilty of manslaughter, the State had to prove beyond a reasonable doubt that Clark "intentionally, knowingly, or recklessly caused the death of Dirk Fast and ... the circumstances did not amount to Murder in the First or Second Degree." But the judge did not include a "stop instruction" directing the jury not to return any verdict on manslaughter if it found Clark guilty of first- or second-degree

[1] AS 11.41.120(a)(1).

murder. Effectively, the jury was instructed to return verdicts both on murder and on manslaughter. But under the definition of manslaughter contained in the jury instructions, murder and manslaughter are defined to be mutually exclusive; if the jury convicted Clark of murder it had to acquit him of manslaughter.

The jury returned a guilty verdict on first-degree murder and two counts of second-degree murder, but a not guilty verdict on manslaughter. Judge Smith immediately recognized the potential inconsistency of these verdicts. Without announcing the verdict, he summoned the parties to a bench conference, where he stated that the verdicts were technically, but not actually, inconsistent, in light of his failure to give the jurors a "stop instruction."[2]

At this point, defense counsel moved for a mistrial. Judge Smith, relying on *Davidson v. State*,[3] opted to submit an interrogatory to the jury, asking the jury to explain its verdicts. He first addressed the jury to explain the situation:

> Typically, when a jury finds a defendant guilty of the charged offense, the jury does not fill out the verdict forms for the lesser-included offense. We did not put any such instruction in the jury instructions for you and that, quite frankly, was my oversight. So what I've done is prepared a written interrogatory for you to answer.

The interrogatory asked the jury to adopt one of three potential explanations for their verdicts. One was that the jury had concluded that the State had failed to prove facts sufficient to establish the *actus reus* and *mens rea* of manslaughter. (Had the jury adopted this response, its verdicts would have been truly inconsistent.) The second was that the jury had interpreted the manslaughter elements instruction to mean that a

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[2] *See* Alaska Criminal Pattern Instruction 1.38.

[3] 975 P.2d 67 (Alaska App. 1999).

conviction for murder precluded a conviction for manslaughter. The third was that the jury had reached some other conclusion. The jury was directed to explain to the court this other conclusion.

Defense counsel objected to the interrogatory, arguing that it was "coercive and suggestive," and that it "pushe[d] the jury towards a verdict that's contrary to the verdict they already submitted." The court overruled this objection.

The jury endorsed the second option, explaining that it felt compelled to acquit Clark of manslaughter once it found him guilty of murder. Judge Smith polled the jury, determined that all of the jurors were in agreement, and then discharged the jury. This appeal followed.

Why we conclude that the superior court's use of a clarifying interrogatory was not an abuse of discretion

Although Alaska Evidence Rule 606(b) prohibits a court from asking jurors to justify their verdict or to explain their deliberative process, it does not prohibit the court from asking jurors whether their verdict accurately conveys their collective decision.[4]

In *Davidson v. State*, a jury convicted the defendant of first-degree assault but acquitted him of the lesser-included offenses of third- and fourth-degree assault.[5] The judge, like Judge Smith in this case, explained to the jury that normally a jury does not return a verdict on lesser offenses if it convicts on the greater offense. The judge directed the jury to answer a written interrogatory comprised of the same three possible scenarios that Judge Smith propounded in the case at bar. The *Davidson* jury was

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[4] *Davidson*, 975 P.2d at 73-74.

[5] *Id.* at 70.

directed to cross out the lesser-included verdicts if the jurors had simply misunderstood the jury instructions and concluded that a conviction on the greater offense compelled acquittals on the lesser-included charges.[6] In response to this interrogatory, the jurors in *Davidson* confirmed that they had acquitted the defendant on the lesser charges "because we thought we were supposed to do that."[7]

We explained in *Davidson* that a court is authorized to utilize this type of written jury interrogatory when the intent of the jury is unclear:

> Alaska [Evidence] Rule 606(b) prohibits a court from questioning jurors "as to any matter or statement occurring during the course of the jury's deliberations or [as] to the effect of any matter or statement upon [any] juror's mind or emotions as influencing the juror to assent to or dissent from the verdict ... or concerning the juror's mental processes in connection therewith." But ... [the rule] is silent concerning a court's authority to question jurors when it appears that the written verdict may not accurately convey their group decision.
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> [The trial judge] did not ask the jurors to justify their verdict or to explain how they arrived at their decision. Rather, he asked the jurors to clarify what their decision had been. Because Rule 606(b) does not prohibit such an inquiry, we conclude that a trial judge has the power to conduct the type of inquiry that was done in Davidson's case.[8]

The interrogatory devised by Judge Smith, virtually indistinguishable from the one approved in *Davidson*, was proper under the circumstances and was not suggestive or coercive. Judge Smith did not ask the jurors to justify their verdicts or to

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[6] *Id.* at 70-71.

[7] *Id.* at 71.

[8] *Id.* at 73-74 (internal citations omitted).

explain their deliberative process. Rather, he simply asked the jury to clarify its decisions. Judge Smith's interrogatory and his accompanying explanation that he neglected to include a stop instruction did not signal to the jury that its decisions were inappropriate or invite jurors to reconsider their verdicts. In light of *Davidson*, we find that Judge Smith did not abuse his discretion in proceeding as he did.

And in light of the jury's interrogatory response, its verdicts are logically reconcilable. The jury reasonably interpreted the manslaughter instruction to require an acquittal on that count for the sole reason that it had convicted Clark of murder. Thus explained, the facially inconsistent verdicts were not inconsistent in fact.

A note to trial judges

Under AS 11.41.120(a)(1), the offense of manslaughter is defined as encompassing every intentional, knowing, or reckless homicide that (1) is unlawful and that (2) does not qualify as murder in either the first or second degree. But as this Court explained in *Edwards v. State*, it is error for a trial judge to take the wording of this statute and import it wholesale into the jury instruction on the elements of manslaughter.[9]

In particular, jurors should *not* be told that the offense of manslaughter requires proof beyond a reasonable doubt that the killing was neither first- nor second-degree murder. That is not an element of manslaughter. Rather, manslaughter is a residual category of unlawful homicide that applies if the government *fails to prove* beyond a reasonable doubt that the homicide was murder.[10]

Because of this, we held in *Edwards* that it is improper to instruct a jury that the crime of manslaughter *requires affirmative proof* that the unlawful homicide was

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[9] *Edwards v. State*, 158 P.3d 847, 856 (Alaska App. 2007).

[10] *Id.* at 856.

committed "under circumstances not amounting to murder in the first or second degree."[11]

Clark's jury received the same instruction that we disapproved in *Edwards*. We again caution and direct trial judges not to use this wording.

Conclusion

We AFFIRM the judgment of the superior court.

[11] *Id.*